APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: January 17, 2001 Decided: April 6, 2001)

Docket No. 99-6299

ROBERT ROSANO, as Executor of the Estate of Mary R. Rosano,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

VAN GRAAFEILAND, NEWMAN & LEVAL,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Seybert, *J.*) which ruled that gifts made via checks, that were written and delivered to the donee prior to the donor's death, but not paid by the bank until after the donor's death, were incomplete at the time of

the donor's death, and that the value of the checks had to be included in the estate for Estate Tax purposes.

Affirmed.

A. LAWRENCE WASHBURN, JR., New York, N.Y. *for Plaintiff-Appellant.*

MARION E.M. ERICKSON, Tax Division, Department of Justice, Washington, D.C. (Paula M. Junghans, Acting Assistant Attorney General, Richard Farber, on the brief, Loretta E. Lynch, United States Attorney, Of Counsel), *for Defendant-Appellee.*

VAN GRAAFEILAND, *Senior Circuit Judge*:

The parties do not dispute the facts, which are aptly summarized in the Report and Recommendation of Magistrate Judge Orenstein, which was adopted, with minor modifications, by Judge Seybert. *Rosano v. United States*, 67 F. Supp. 2d 113 (E.D.N.Y. 1999). This case concerns an attempt by the decedent, Mary Rosano, to decrease the amount of money in her taxable estate by making gifts of less than $10,000 to numerous relatives and friends. She did this by writing checks to relatives and friends. Mary Rosano died on January 21, 1990. The checks in question were not paid until after her death.

Rosano's executor did not include the amount of the disputed checks in the estate. The IRS conducted an audit and increased the value of the estate by the amount of the disputed checks, resulting in an additional estate tax liability of

$200,948.57. Additionally, the IRS imposed $35,349.00 in penalties plus $63,702.30 in interest. The estate paid these amounts in full, then filed a claim for a refund. The IRS denied the refund, and the estate filed the instant suit.

The case was assigned to Magistrate Judge Orenstein. Judge Orenstein stated that any gift of $10,000 or less that was "completed" prior to Mary Rosano's death should not be included in the estate. 67 F. Supp. 2d at 119. The issue, therefore, was whether checks that were paid after Mary Rosano died were "completed gifts". *Id.* Federal law provides that a gift is completed when the donor has parted completely with "dominion and control" over the gift. *Id.* To determine whether Rosano parted with dominion and control, Judge Orenstein turned to New York state law. Under New York law, Mary Rosano had the ability, at any time until the checks were paid, to order that payment on the checks be stopped. Thus, she retained dominion and control over the checks at the time of her death and the gifts were not completed. *Id.* at 120-21.

Judge Orenstein next considered the estate's argument that the checks should be considered to have been paid on the date they were delivered by Rosano to the donees, rather than on the date they were actually paid. The estate's argument was a variation on the doctrine of "relation-back," which generally is applied in cases involving charitable donations. Under it, checks delivered to donee charities prior to a decedent's death but not paid until after the decedent's death may be considered completed on the date of delivery. *Estate of Belcher v. Commissioner*, 83 T.C. 227 (1984). Recently this doctrine was extended to the non-charitable donation context, to govern whether a gift was made within a year in which it would be exempt from the gift tax, but in that case the donor was alive at the time the checks were paid. *Metzger v. Commissioner*, 38 F.3d 118 (4th Cir. 1994). The estate has pointed

to no court that has allowed payment to relate back to the date of delivery if the donor was deceased on the date of actual payment and the donee was not a charitable entity.

DISCUSSION

The decision below correctly resolves the arguments made by appellant. We address only appellant's argument that we should apply the doctrine of relation-back to gifts made to non-charitable donees where the donor has died prior to the payment of the gifts.

The doctrine of relation-back is entirely judicially created. *See id.* at 124 (Luttig, *J.*, dissenting). Accordingly, in evaluating appellant's argument, we have no easy recourse to legislative authority. Rather, we must evaluate the policy goals that led the courts to create the doctrine, and determine whether the goals are met by applying the doctrine in the instant case. We conclude that they are not.

Other courts have refused to apply the doctrine when the decedent died prior to payment of a non-charitable gift. *McCarthy v. United States*, 806 F.2d 129, 131-33 (7th Cir. 1986); *Newman v. Commmissioner*, 111 T.C. 81 (1998). In *McCarthy*, the court offered two reasons for its refusal to extend the doctrine of relation-back. First, a rationale for applying the doctrine in the charitable context was not present in the non-charitable context. Checks delivered by the decedent to a charity but not paid until after the decedent's death, if included in the estate, would generate a deduction for the estate. This deduction would result in a "wash" for estate tax purposes, meaning that the estate would obtain the benefit of the charitable deduction whether or not the doctrine of relation-back was applied. For practical purposes, it makes more sense to consider the checks as outside the estate. "No such practical consideration extends to non-charitable gifts. No offsetting deduction exists for gifts made

to noncharitable donees." *McCarthy*, 806 F.2d at 132. Second, the court thought that extending the doctrine would allow for improper tax avoidance: "By issuing a check to a noncharitable donee with the understanding that it not be cashed until after his death, a decedent may effectively bequest up to $10,000 per donee, thus avoiding the estate tax consequences normally attending such transactions." *Id.* *Accord Metzger*, 38 F.3d at 122.

We agree with the policy concerns expressed by the *McCarthy* and *Metzger* courts. Thus, we will not apply the doctrine where gifts are made to a non-charitable donee and the donor died prior to the date of payment. We express no opinion as to whether we would apply the doctrine where there is a non-charitable donee and the donor is alive on the date of payment.

Appellant argues that it violates the Equal Protection Clause to treat gifts made to charitable donees and non-charitable donees differently. This argument is meritless. From the first Revenue Act, Congress has consistently placed charitable and religious institutions in one class and non-charitable institutions in another. *First Nat'l Bank of Omaha v. United States*, 681 F.2d 534, 538 (8th Cir. 1982). Appellant's argument would invalidate a long history of statutory distinctions. Further, this Court has consistently upheld distinctions between charitable and non-charitable entities. *E.g.*, *Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159, 1167-68 (2d Cir. 1995); *Ad-Express, Inc. v. Kirvin*, 516 F.2d 195, 197-98 (2d Cir. 1975). The distinction is especially warranted in the context of a "relation back" claim because of the "wash" consequence for charitable gifts, which we have previously noted.

We have considered all of appellant's other arguments and find them to be without merit. The judgment of the district court is affirmed.

APPENDIX B

ORDER OF THE MERIT SYSTEMS PROTECTION BOARD DATED DECEMBER 12, 1980

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LAWRENCE R. ROSANO

v.

MSPB Docket No.
SF315H8010134

DEPARTMENT OF THE NAVY
U.S. MARINE CORPS

ORDER

The Board, having fully considered appellant's petition for review of the initial decision issued on August 20, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.*

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.115(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703, A, petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:
December 12, 1980

Robert E. Taylor
Secretary

Washington, D.C.

APPENDIX C

DECISION SHEET TO MSPB ORDER, December 12, 1980

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DECISION SHEET

IN THE MATTER OF:
Lawrence R. Rosano v. Navy (USMC) Probationary Termination
Docket No. SF315H801034

Staff Recommendation:
Petition for review denied.

REFERRED TO:
☐ Special Counsel ☐ OCC ☐ Special Decisions ☐ OA

Date _____ For the Board _____

TO BOARD: 11/28/80 DECISION DUE: 12/18/80

BOARD ACTION:

	Agree	Disagree	Modify	Date	Income Under Secretary's Signature Yes	Income Under Secretary's Signature No	Newsworthy Yes	Newsworthy No
Ruth T. Prokop, Chairwoman								
Ersa H. Poston, Vice Chair	See Inst. ✓		as modified	12 10 80	✓			✓
Ronald P. Wertheim, Member	✓		as modified	12 10 80	✓			

SECRETARY ACTION:
Issued by the Secretary pursuant to 20 day policy.

Date _____ Secretary _____

Date Returned to the Office of the Secretary: 12/12/80
Date Serviced by the Office of the Secretary: 12/12/80

APPENDIX D

New York State Uniform Commercial Code

§ 3-409. Draft Not an Assignment.

(1) A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it.

§ 4-102. Applicability.

(1) To the extent that items within this Article are also within the scope of Articles 3 and 8, they are subject to the provisions of those Articles. In the event of conflict the provisions of this Article govern those of Article 3 but the provisions of Article 8 govern those of this Article.

§ 4-405. Death or Incompetence of Customer.

(1) A payor or collecting bank's authority to accept, pay or collect an item or to account for proceeds of its collection if otherwise effective is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes such authority to accept, pay, collect or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.

(2) Even with knowledge a bank may for 10 days after the date of death pay or certify checks drawn on or prior to that date unless ordered to stop payment by a person claiming an interest in the account.

Official Comment

Prior Uniform Statutory Provision: None.

Purposes:

1. This section is new, although similar statutory provisions are

in existence in seven states.

2. Subsection (1) follows existing decisions which hold that a drawee (payor) bank is not liable for the payment of a check before it has notice of the death or incompetence of the drawer. The justice and necessity of the rule are obvious. A check is an order to pay which the bank must obey under penalty of possible liability for dishonor. Further, with the tremendous volume of items handled any rule which required banks to verify the continued life and competency of drawers would be completely unworkable.

One or both of these same reasons apply to other phases of the bank collection and payment process and the rule is made wide enough to apply to these other phases. It applies to all kinds of "items"; to "customers" who own items as well as "customers" who draw or make them; to the function of collecting items as well as the function of accepting or paying them; to the carrying out of instructions to account for proceeds even though these may involve transfers to third parties; to depositary and intermediary banks as well as payor banks; and to incompetency existing at the time of the issuance of an item or the commencement of the collection or payment process as well as to incompetency occurring thereafter. Further, the requirement of actual knowledge makes inapplicable the rule of some cases that an adjudication of incompetency is constructive notice to all the world because obviously it is as impossible for banks to keep posted as to death of immediate or remote customers.

3. Subsection (2) provides a limited period after death during which a bank may continue to pay checks (as distinguished from other items) even though it has notice. The purpose of the provision, as of the existing statues, is to permit holders of checks drawn and issued shortly before death to cash them without the necessity of filing a claim in probate. The justification is that such checks normally are given in immediate payment of an obligation, that there is almost never any reason why they should not be paid, and that filing in probate is a useless formality, burdensome to the

holder, the executor, the court and the bank.

This section does not prevent an executor or administrator from recovering the payment from the holder of the check. It is not intended to affect the validity of any gift causa mortis or other transfer in contemplation of death, but merely to relieve the bank of liability for the payment.

4. Any surviving relative, creditor or other person who claims an interest in the account may give a direction to the bank not to pay checks, or not to pay a particular check. Such notice has the same effect as a direction to stop payment. The bank has no responsibility to determine the validity of the claim or even whether it is "colorable". But obviously anyone who has an interest in the estate, including the person named as executor in a will, even if the will has not yet been admitted to probate, is entitled to claim an interest in the account.

APPENDIX E

New York State Judiciary Law
§ 487. Misconduct by Attorneys

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Added L.1965, c. 1031, § 123.

APPENDIX F

The Law of Bank Deposits, Collections and Credit Cards. Revised Edition. Barkley Clark & Barbara Clark. P 4.01 [1] [c]

[c] The Deathbed Gift Cases

In re Estate of Zatulove[30] involved a claim against the estate of a decedent-drawer for the amount of checks given as a gift prior to his death but not presented for payment until after the drawer's death. The checks were dishonored since the account had been frozen. The court held that the gift was incomplete and was revoked by the death of the drawer because there had been no delivery of the funds in the bank account. The court relied on the theory underlying § 3-409 that the mere writing of a check does not constitute an assignment of funds in the drawer's account and that no gift would thus be complete prior to final payment of the check.

As an interesting sidelight, § 4-405 authorizes a drawee bank to pay items or 10 days after receiving word of the drawer's death, but Comment 3 to that section makes it clear that the provision "is not intended to affect the validity of any gift causa mortis or other transfer in contemplation of death, but merely to relieve the bank of liability for the payment."

Holsomback v. Akins[31] is another interesting estate planning case in which a stepson sued his stepmother's estate for $7,000, the amount of a check she drew to his order shortly before her death, in settlement of what he had coming from his father, who had died a year earlier. As part of an apparent squeeze on the stepson, the stepmother's business associate had stopped payment on the $7,000 check shortly after the father's death and long before the stepmother expired. The drawee bank honored the stop payment order, even though its action was improper, because the business associate was neither the bank's customer nor a "person claiming an interest in the account" seeking to stop payment after the

drawer's death under § 4-405(2). A suit by the stepson against the bank on the check would have failed in any case, however, since there is no privity of contract between holder and drawee bank in the absence of certification. Therefore, the stepson filed his claim in the stepmother's estate on two theories: (1) Delivery of the check constituted a gift, and (2) the estate was liable on an independent contract theory.

As to the gift theory, the court correctly held that the gift was not complete until the check was paid by the bank, since a check does not constitute an assignment of funds under § 3-409. Therefore, receipt of the check following the death of the father and its failure to be paid prior to or after the death of the stepmother rendered the gift incomplete. By contrast, if the bank had paid the check after the stepmother's death pursuant to § 4-405, Comment 3 to that section suggests that the gift would be complete. As to the contract theory, the court concluded that the stepson would have an enforceable claim against the estate if he could prove that his father promised him the money, thus imposing a legally enforceable obligation on the stepmother, which she breached by seeing that payment was stopped on the item. Although such a contract theory would not necessarily be inconsistent with § 3-409, the obvious difficulty would be to show sufficient consideration or to protect the stepson as a third-party beneficiary.

A classic application of the general rule is found in *In re Estate of Bolton,*[32] where a gift of a $20,000 check from father to daughter was voided when the father died before the check was presented to (and dishonored by) the drawee bank. The check did not operate as an assignment of the father's funds in the account. Since the father's death acted as a revocation of his order to pay, the gift was not complete even though the check had been delivered. Moreover, the daughter could not recover against the estate since she did not qualify as a holder in due course, having failed to acquire the check for value.

As the prior cases illustrate, deathbed gifts are not favored in the law. They are a fruitful source of litigation, almost like the automatic will contest. They lack all the formalities that the law throws around wills, and they tempt fraud. Still, common law allows deathbed gifts (called gifts causa mortis) so long as three conditions are met: (1) The gift must be one of personal property; (2) the gift must be made in the donor's last illness, under a strong apprehension of death; and (3) possession of the property must be delivered at the time of the gift, or at least by the time of death.

In addition to the cases discussed previously, two recent cases-one from Virginia and one from Ohio-show how reluctant courts are to give effect to deathbed gifts, particularly when the property is a bank check. The delivery condition is the killer. In both cases, the gift was voided based on the rules of negotiable instruments and bank collections.

In *Smart v. Woo,*[33] the facts reflect Chinese cultural traditions that were negated by the UCC. Woo and Yee were longtime lovers. They often lived together and held themselves out as husband and wife. Two days before his death, Yee called Woo and told her he felt "terribly bad," he had a "heaviness" in his chest, and believed he would shortly die. That night he gave her two checks-one for $42,000 drawn on an account at Signet Bank and one for $80,000 drawn on an account at Central Fidelity Bank. He told her that if he died he wanted her to be taken care of. Yee died two days later. After Yee's death, Woo cashed the $42,000 check; the $80,000 was never cashed. The administrator of Yee's estate brought a declaratory judgment action against Woo seeking to recover the $42,000 and an order that the estate did not owe the $80,000. The issue before the court was whether the gift causa mortis was valid. The first two elements were easily established. It was clear from the facts that Yee intended to give Woo the funds represented by the checks. Moreover, he clearly was under apprehension of death. There was also no doubt that the gift was one of personal property. But was the gift effectively delivered

before Yee died? In finding that there was no effective delivery, the court focused on the no-assignment rule of the UCC. Thus, while pieces of paper were delivered, no *money* was delivered until the checks were paid by the drawee banks. An assignment of funds was necessary before delivery could be complete for purposes of making the gift.

The court looked at it this way: Until the checks are paid, the donor retains dominion and control over the funds, with power to issue a stop payment order and thus revoke the gift. This power to stop payment defeats the gift. Moreover, a check is nothing more than an order by the drawer to the drawee to pay funds to a third party, and this order is automatically revoked upon the drawer's death. Finally, until the check is paid, the donor may intentionally or inadvertently defeat the gift by any number of acts, including a stop payment order or a garnishment against the account. In short, there are simply too many contingencies to consider a gift as complete simply by delivery of the check. Therefore, Woo had to return the $42,000 and had no claim to the $80,000.

Woo argued that the rule of § 3-409 (1) is intended only to protect banks from liability to payees and other holders prior to final payment of checks, and that it should have no effect on the rules governing deathbed gifts. The court rejected that argument but never really answered it. Moreover, the court never cited § 4-405, which states clearly that death does *not* revoke the drawer's authority to pay an item. However, the Official Comment to that section states that "it is not intended to affect the validity of any gift causa mortis or other transfer in contemplation of death, but merely to relieve the bank of any liability for the payment." Perhaps it was correct to ignore the impact of § 4-405, yet rely on the no-assignment rule of § 3-409, which does not contain a similar Official Comment. In short, the court was probably correct in its decision, particularly given the traditional judicial hostility to deathbed gifts. Woo argued that such deathbed gifts are a tradition in China, where the writing of a will is thought to "tempt" death. Although respect-

ful of this tradition, the Virginia court felt that the law was settled on the requirement of delivery prior to the donor's death. There was no completed delivery in this case.

The Ohio case is *DeLuca v. BancOhio National Bank.*[34] In that case, a 78-year-old lawyer named Joseph Rotondo was dying of emphysema and related heart problems. On January 27, when he felt very ill, he called his secretary, Carolyn DeLuca, to take him to the hospital. They first stopped at his office where he signed several blank payroll checks that were on his desk. Before they left for the hospital, Rotondo told DeLuca that he had one blank check for her in his desk. On his deathbed that same day he asked how much she needed to pay her debts in full. She said $75,000. He told her that if he died she was to fill in the blank check on his desk for that amount.

After Rotondo died later that day, DeLuca went to the office, removed the blank check, filled it in for $75,000, and presented it for payment the next morning (Saturday) at the bank where they both had their accounts. Since the check was an "on-us" item, she asked the teller if it could be treated as a cash deposit for availability purposes. The deposit slip was changed to reflect a $75,000 deposit of "currency." The teller then electronically debited the Rotondo account and electronically credited the DeLuca account. No money ever changed hands over the counter. Under the bank's internal coding guidelines, the check had been cashed.

On Monday morning, the decedent's son obtained a temporary restraining order (TRO) ordering the bank to stop payment of the check prior to its midnight deadline. The bank dishonored the check and returned it to DeLuca with a notation that it had been bounced because of the TRO. DeLuca sued the bank on the ground that it had wrongfully removed the funds from her account after final payment had been made on Saturday morning.

The threshold issue as the court saw it was whether the bank had made final payment of the $75,000 check. The court found that final payment had been made because the bank had paid the item

in cash on Saturday morning. Payment in cash is indeed one of the milestones of final payment.[35] The court felt that it would be a meaningless gesture for the teller to give DeLuca $75,000 in currency, and then have her pass it back to the teller across the counter for deposit into her account. The court also cited § 4-403(1)(b), which states that a stop order or legal process comes too late if the item is paid in cash. On either ground, the court found that the TRO came too late.

But instead of validating the gift, the court bought the bank's "last line of defense"-that DeLuca breached her presentment warranty to the bank under § 4-207 because the item had been materially altered. Under § 3-407(2), completion of a bank item other than as authorized is a material alteration. In this case, the court found that DeLuca had no authority to fill in the incomplete check after the drawer died. On this critical point, the Ohio court (like the Virginia court) cited §3-409 for the proposition that a check is not of itself an assignment of funds.

In other words, the gift was not complete until payment, which took place after the drawer's death; by that time, the check could be completed only through a material alteration. Therefore, even though the check was finally paid before the TRO got to the bank, the donee lost. The key to the Ohio case, like the Virginia case, is that a gift is not complete by the mere drawing of a check, because the check is not an assignment of the donor's funds under the UCC.

APPENDIX G

Federal Rule of Evidence Rule 801(d)(2)

(d) Statements which are not hearsay
A statement is not hearsay if-

(2) Admission by party-opponent
The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Federal Rule of Evidence Rule 803 (6) and (7)

(6) Records of regularly conducted activity
A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, was the regular practice of that business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6)
Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

APPENDIX H

26 CFR § 25.2511-2 Cessation of donor's dominion and control

(a) The gift tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

INTERNAL REVENUE CODE

5 U.S.C. § 7430. Awarding of costs and certain fees

(a) In general-In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for-

(1) reasonable administrative costs incurred in connection with such administrative proceeding within the Internal Revenue Service, and

(2) reasonable litigation costs incurred in connection with such court proceeding.

(c)(3) **Attorneys' fees.-**

(A) In general.-For purposes of paragraphs (1) and (2), fees for the services of an individual (whether or not an attorney) who is authorized to practice before the Tax Court or before the Internal Revenue Service shall be treated as fees for the services of an attorney.

(B) Pro bono services.-The court may award reasonable attorneys' fees under subsection (a) in excess of the attorneys' fees paid or incurred if such fees are less than the reasonable attorneys' fees because an individual is representing the prevailing party for no fee or for a fee which (taking into account all the facts and circumstances) is no more than a nominal fee. This subparagraph shall apply only if such award is paid to such individual or such individual's employer.

(4) Prevailing party.-

(A) In general.-The term "prevailing party" means any party in any proceeding to which subsection (a) applies (other than the United States or any creditor of the taxpayer involved)-

(i) which-

(I) has substantially prevailed with respect to the amount in controversy, or

(II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) which meets the requirements of the 1st sentence of section 2412(d)(1)(B) of title 28, United States Code (as in effect on October 22, 1986) except to the extent differing procedures are established by rule of court and meets the requirements of section 2412(d)(2)(B) of such title 28 (as so in effect).

[(iii) Redesignated (ii)]

(B) Exception if United States establishes that its position was substantially justified.-

(i) General rule.-A party shall not be treated as the prevailing party in a proceeding to which subsection (a) applies if the United States establishes that the position of the United States in the proceeding was substantially justified.

(ii) Presumption of no justification if Internal Revenue Service did not follow certain published guidance.-

For purposes of clause (i), the position of the United States shall be presumed not to be substantially justified

if the Internal Revenue Service did not follow its applicable published guidance in the administrative proceeding. Such presumption may be rebutted.

(iii) Effect of losing on substantially similar issues.- In determining for purposes of clause (i) whether the position of the United States was substantially justified, the court shall take into account whether the United States has lost in courts of appeal for other circuits on substantially similar issues.

(iv) Applicable published guidance.-For purposes of clause (ii), the term "applicable published guidance" means-

(I) regulations, revenue rulings, revenue procedures, information releases, notices, and announcements, and

(II) any of the following which are issued to the tax payer: private letter rulings, technical advice memoranda, and determination letters.

(C) Determination as to prevailing party.-Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or-

(i) in the case where the final determination with respect to the tax, interest, or penalty is made at the administrative level, by the Internal Revenue Service, or

(ii) in the case where such final determination is made by a court, the court,

APPENDIX I

§ 25.2514-3 Powers of appointment created after October 21, 1942.

(b) *Joint powers created after October 21, 1942.* The treatment of a power of appointment created after October 21, 1942, which is exercisable only in conjunction with another person is governed by section 2514(c)(3), which provides as follows:

(1) Such a power is not considered as a general power of appointment if it is not exercisable by the possessor except with the consent or joinder of the creator of the power.

(2) Such power is not considered as a general power of appointment if it is not exercisable by the possessor of a person having a substantial interest in the property subject to the power which is adverse to the exercise of the power in favor of the possessor, his estate, his creditors, or the creditors of his estate. An interest adverse to the exercise of a power is considered as substantial if its value in relation to the total value of the property subject to the power is not insignificant. For this purpose, the interest is to be valued in accordance with the actuarial principles set forth in § 25.2512-5 or, if it is not susceptible to valuation under those provisions, in accordance with the general principles set forth in § 25.2512-1. A taker in default of appointment under a power has an interest which is adverse to an exercise of the power. A coholder of the power has no adverse interest merely because of his joint possession of the power nor merely because he is a permissible appointee under a power. However, a coholder of a power is considered as having an adverse interest where he may possess the power after the possessor's death and may exercise it at that time in favor of himself, his estate, his creditors, or the creditors of his estate. Thus, for example, if X, Y, and Z held a power jointly to appoint among a group of persons which includes themselves and if on the death of X the power will pass to Y and Z jointly, then Y and Z are considered to have interests adverse to the exercise of the power in favor of X. Similarly, if on Y's death the power will pass to Z, Z is considered to have an interest adverse to the exercise of the power in favor of Y.

APPENDIX J

26 C.F.R. § 25.2511-2

(e) A donor is considered as himself having a power if it is exercisable by him in conjunction with any person not having a substantial adverse interest in the disposition of the transferred property or the income therefrom.

26 C.F.R. § 25.2511-1

(g)(1) Donative intent on the part of the transferor is not an essential element in the application of the gift tax to the transfer. The application of the tax is based on the objective facts of the transfer and the circumstances under which it is made, rather than on the subjective motives of the donor.

5 C.F.R. 1201.56 Burden and degree of proof, affirmative defenses

(a) Burden and degree of proof. (1) Agency: Under 5 U.S.C. 7701(c)(1) the agency action must be sustained by the board if:

(i) It is brought under 5 U.S.C. 4303 and is supported by substantial evidence; or

(ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence.

(2) *Appellant:* The appellant shall have the burden of proof as to issues of jurisdiction and timeliness of filing.

(b) *Affirmative defenses of the Appellant.* Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action by the

agency even where the agency has met the evidentiary standard set forth in subsection (a), above, in any case where the appellant:

(1) Shows harmful error in the application of the agency's procedures in arriving at such decision;

(2) Demonstrates that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) Shows that the decision was not in accordance with law.

APPENDIX K

Federal Register/Vol. 44, No. 127/Friday, June 29, 1979/ Rules and Regulations p. 38345

(Explanation of 5 C.F.R. 1201.56)

Section 1201.56 *Burden and degree of proof, affirmative defenses.*

A number of commentators have asserted that this proposed section appeared to place the burden of proof on the appellant. Since the statute requires precisely the opposite, the Board has made it clear that the burden of proof is on the agency. If the agency meets the burden of proof, the Board must sustain its decision. An exception to this rule occurs when the appellant can demonstrate one of three affirmative defenses. In that instance, the agency decision must be overturned even though the burden of proof has been met.

APPENDIX L

§ 7702. Actions involving discrimination

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, or petition as of the date it is filed with the proper agency.

Added Pub.L. 95-454, Title II, § 205, Oct. 13, 1978, 92 Stat. 1140, and Amended Pub.L. 96-54, § 2(a)(46), Aug. 14, 1979, 93 Stat. 384.)

§ 8912. Jurisdiction of courts

The district courts of the United States have original jurisdiction, concurrent with the United States Court of Federal Claims, of a civil action or claim against the United States founded on this chapter.

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 607; Pub.L. 97-164, Title I, § 160(a)(3), Apr. 2, 1982, 96 Stat. 48; Pub.L. 102-572, Title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4516.

APPENDIX M

TSSG
Dreyfus Family of Funds
P.O. Box 9671
Providence, RI 02940-9671

December 26, 1991

Lawrence R. Rosano
1662 Lydia Ave
Elmont, NY 11003

Re:Dreyfus 100% U.S. Treasury Long Term Fund, L.P.
Account Number: 073-1001167277

Dear Mr. Rosano:

We are contacting you in regards to the above referenced account.

You have been proviously informed of an overpayment in the amount of $28, 607.69 which occurred on March 13, 1990. Because you have failed to take action to resolve this matter, we plan to report the proceeds, received by you, to the Internal Revenue Service (IRS) via Form 1099-Misc.

In Order to prevent this information from being filed with the IRS, The Shareholder Services Group must have full resolution to this debt by January 16, 1992.

Please send your check, made payable to The Shareholder Services Group, for the full amount to:

The Shreholder Services Group
Attn: Susan Hall PRO2
One American Express Plaza
Providence, RI 0203-1135

If you have any questions, please call me, collect, (401) 454-9317, Monday though Friday, between 7:30 a.m. and 4:00 p.m., Eastern Time.

Sincerely,

Susan Hall
Reclaim Administrator

APPENDIX N

Special Counsel investigations of a pattern of prohibited practices

The Senate bill provides that if the Special Counsel believes that there is a pattern of prohibited personnel practices by any agency or employee and such practices involve matters which are not otherwise appealable to the Board under section 7701, the special counsel may seek corrective action by filing a written complaint with the Board. For example, there may be hiring or promotion practices which violate merit system principles but which may not give rise to an appealable action under this title. Similarly competitive examinations may be administered in such a way as to constitute a violation of section 2302. Under this paragraph, the Special Counsel would have authority to seek corrective action, and the Board is empowered to order such corrective action as it finds necessary.

The House amendment contains no comparable provision.

The conference substitute in section 1206 (h) adopts the Senate provision. By adopting this provision, the conferees do not intend to divest the Civil Service Commission's Bureau of Personnel Management Evaluation or its successor unit in the Office of Personnel Management of its present functions including its authority to order corrective actions. The Senate bill makes it a prohibited personnel practice to grant any preference or advantage not authorized by law, rule, or regulation to any person for the purpose of improving or injuring the prospects of any particular individual or "category of individuals." The substitute omits this phrase but it is expected that a pattern of activities disadvantaging a category of individuals would be actionable under this subsection.